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# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ 1930

No. ~~800~~ 74

THE UNITED STATES OF AMERICA, PETITIONER

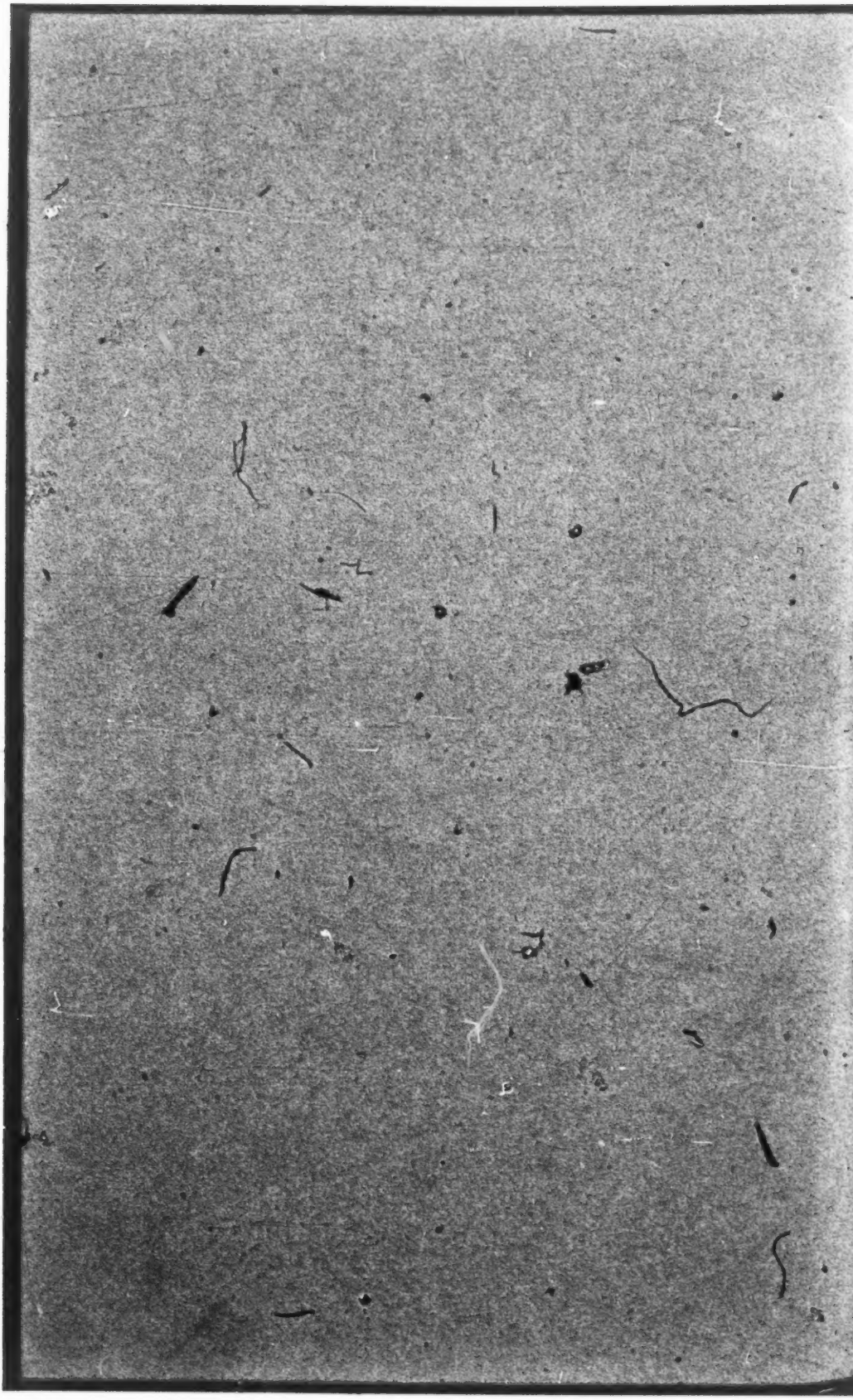
vs.

ANTHONY LA FRANCA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

**PETITION FOR CERTIORARI FILED APRIL 7, 1930**
**CERTIORARI GRANTED MAY 5, 1930**

(34931)



# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1929

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## No. 800

## THE UNITED STATES OF AMERICA, PETITIONER

vs.

## ANTHONY LA FRANCA

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A [Caption omitted.]

1 In United States District Court, Eastern District of Louisiana, New Orleans Division

*Petition*

Filed Nov. 9, 1927

Now comes the United States of America, by Wayne G.
2 Borah, United States attorney, and T. M. Logan Bruns, assistant United States attorney for the Eastern District of Louisiana, and bring this action on behalf of the United States against Anthony LaFranca, a citizen of the State of Louisiana, domiciled in the city of New Orleans, in said State and within the jurisdiction of this court; this action being brought at the request of the Commissioner of Prohibition, through the prohibition administrator for the tenth prohibition administrative district and upon information furnished by said prohibition administrator; and with respect represents:

I

That on the dates hereinafter mentioned, the defendant was the owner, operator, and proprietor of the restaurant commonly known as the "Delmonico Restaurant," located at the municipal number 1300 St. Charles Avenue, in the city of New Orleans, State of Louisiana.

II

That at or about 9.00 p. m., October 10, 1924, in said restaurant, the defendant did possess and sell to one William Trahan, a white man, at the rate of fifty cents ($.50) per drink, nine (9) drinks of whiskey for the sum of four dollars and fifty cents ($4.50).

III

That at or about 10.20 p. m., October 23, 1924, in said restaurant, defendant did possess and sell to the said William Trahan, at the rate of fifty cents ($.50) per drink, five (5) drinks of whiskey for the sum of two dollars and fifty cents ($2.50); and on the
3 same date, time, and place, defendant did possess and sell to one Eugene Hogan, a white man, at the rate of fifty cents ($.50) per drink, two drinks of whiskey for the sum of one dollars ($1.00).

IV

That at or about 5.00 p. m., October 24, 1924, in said restaurant, the defendant did possess and sell to the said E. M. Hogan, at the rate of fifty cents ($.50) per drink, two drinks of apricot brandy for the

sum of one dollar ($1.00); and on the same date, time and place, defendant did possess and sell to the said William Trahan, for one dollars and fifty cents ($1.50) one-half pint of apricot brandy.

V

That at or about 8.00 p. m., April 23, 1925, in said restaurant, the defendant did possess and sell to the said William Trahan, at the rate of seventy-five cents ($.75) per drinks four (4) drinks of benedictine for the sum of three dollars ($3.00).

VI

That at or about 7.00 p. m., April 25, 1925, in said restaurant, the defendant did possess and sell to the said William Trahan, at the rate of fifty cents ($.50) per drinks three (3) drinks of whiskey for the sum of one dollars and fifty cents ($1.50), and one bottle containing five (5) ounces of whiskey for one dollars and fifty cents ($1.50).

4

VII

That all the drinks of liquors, to wit: Whiskey, benedictine, and apricot brandy, possessed and sold by defendant, as aforesaid, were distilled spirits, intoxicating liquors fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume.

VIII

That by reason of his selling, as aforesaid, distilled spirits in less quantity than five wine gallons at the same time, to wit: Nine (9) drinks of whiskey on October 10, 1924; five (5) drinks of whiskey on October 23, 1924; two (2) drinks of apricot brandy on October 24, 1924; four (4) drinks of benedictine on April 23, 1925, and three (3) drinks of whiskey and five (5) ounces of whiskey on April 25, 1925, the defendant became, and was, on the aforesaid dates a retail liquor dealer, subject to the payment of a tax as such, to plaintiff, as provided by section 3244, of the United States Revised Statutes as amended and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act, in the sum of thirty-seven dollars and fifty cents ($37.50) being the special tax of a retail liquor dealer for nine (9) months, ending June 30, 1925.

IX

That the aforesaid retail liquors dealer's tax was due and payable to plaintiff by this defendant on October 10, 1924, and defendant was required, as provided by section 53 of act of October 1, 1890, 26 Stat. L. 624, to make and file a return on that date, but defend-

5 ant failed so to do and has so failed up to this date and thereby has incurred an additional tax penalty, which is due

and payable to plaintiff as provided by section 3176 of the United States Revised Statutes, as amended, in the sum of four dollars and sixty-eight cents ($4.68).

X

That act No. 39 of the Legislature of the State of Louisana, approved November 16, 1921, prohibits the business of a retail liquor dealer in the State of Louisiana, and so prohibited such business during the years 1924 and 1925.

XI

That by reason of the aforesaid sales this defendant did carry on, on the aforesaid dates, the business of a retail liquor dealer, as defined in section 3244 of the United States Revised Statutes as amended, contrary to the law of the State of Louisana, and incurred thereby a special tax in the sum of fifteen hundred ($1,500.00) dollars which is due and payable to plaintiff as provided by section 701 of the revenue act of 1924, in lieu of section 1001 of the revenue act of 1921, which was in turn in lieu of section 1001 of the revenue act of 1918, and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act.

XII

That by reason of the aforesaid sales of intoxicating liquor
6 on the dates heretofore set out, defendant became, and was, a retail liquor dealer and as set forth in section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act, became liable to plaintiff in the penal sum of five hundred ($500.00) dollars, as provided by said section 35.

XIII

Plaintiff further shows that in the proceeding entitled The United States vs. Anthony LaFranca, No. 18034, of the docket of this court the said Anthony LaFrance in his amended and supplemental answer filed therein in his behalf by his solicitor, John E. Jackson, did admit that on October 23, 1924, he sold to one William Trahan, intoxicating liquor, to wit, two (2) drinks of whiskey.

XIV

Plaintiff further shows that in the proceeding entitled The United States vs. Anthony LaFranca, No. 10124 of the docket of this court, the said Anthony LaFranca on April 28, 1926, did plea guilty to the charge of selling intoxicating liquor on the dates and in the form and manner set forth in articles two, three, four, and six of this petition, to wit: On October 10, 1924, nine (9) drinks of whiskey, on October 23, 1924, whiskey, on October 24, 1924, brandy, on April 25, 1925, whiskey; all of said intoxicating liquor being sold by the

said Anthony LaFranca at 1300 St. Charles Avenue, this city, and containing more than one-half of one per cent of alcohol by volume.

XV

That on April 22, 1927, O. D. Jackson, prohibition administrator for the tenth prohibition administrative district, acting for
7 the Prohibition Commissioner, posted by registered mail to this defendant the following notice:

MR. ANTHONY LAFRANCA,
*1300 St. Charles Ave., New Orleans.*

SIR: You are hereby notified it has been made to appear that you have unlawfully sold intoxicating liquors in violation of the national prohibition act, to wit: On October 23rd, 10th, 24th, 1924; April 23rd and 25th, 1925; and as a result thereof have incurred liability to the United States of America in the following sums:

| | |
|---|---|
| Special tax as retail liquor dealer, 9 months ending 6/30/24, sec. 3244, R. S., doubled by sec. 35, Title II, N. P. A | $37.50 |
| 25% penalty for failure to make return as required by law, sec. 3176 R. S., as amended | 4.68 |
| Special tax as retail liquor dealer, 9 months ending 6/30/24, in violation of State law of Louisiana, sec. 701, rev. act 1926, doubled by sec. 35, Title II, N. P. A | 1,500.00 |
| Specific penalty for unlawful sales as retail liquor dealer. Sec. 35, Title II, N. P. A | 500.00 |
| Total liability | 2,042.18 |

Demand is hereby made upon you for payment or adjustment of the said taxes and penalties, and unless same are adjusted within 15 days from the date of this notice, a schedule of such liability will be certified to the United States attorney for the judicial district wherein the violation was committed, with request that action
8 thereon be forthwith brought for the recovery of said taxes and penalties.

XVI

That on August 11, 1927, having discovered certain errors in the above set forth demand made on Anthony LaFranca by letter of April 22, 1927, to wit: That the dates therein referred to as "9 months ending 6/30/24" should be 9 months ending 6/30/25, and the "sec. 701 rev. act of 1926" therein referred to should be 701 rev. act of 1924, the said O. D. Jackson, acting for the Prohibition Commissioner and on behalf of the United States of America, did make another demand on the said Anthony LaFranca in the form and manner set forth in article fifteen of this petition in which said typographical errors were corrected.

XVII

That registered return receipt cards No. 101919 and No. 76762 of the United States post office shows that both of said demands were

received by defendant, to wit, on April 24, 1927, and August 12, 1927, but that said demands have been without avail.

XVIII

Because of the facts set forth above there is due by defendant to plaintiff the sum of two thousand and forty-two and 18/100 ($2,042.18) dollars, which sum plaintiff is entitled to recover.

Wherefor, plaintiff prays that defendant be served with a
9 copy of this petition and cited to answer that after legal delay and due proceedings had, plaintiff, the United States of America, have and recover of defendant, Anthony LaFranca, the full sum of two thousand and forty-two and 18/100 ($2,042.18) dollars and all costs of this proceedings.

(Signed) WAYNE G. BORAH,
*United States Attorney.*
(Signed) T. M. LOGAN BRUNS.
*Asst. U. S. Attorney.*

[*Duly sworn to by T. M. Logan Bruns, jurat omitted in printing.*]

In United States District Court

*Special demurrer*

Filed Dec. 2, 1927

Now, comes, Anthony LaFranca, made defendant in the
10 above numbered and entitled cause, appearing solely for the purpose of this demurrer, demurs to the petition herein on the following ground, to wit:

That the United States attorney appearing for the United States, has no right or authority to appear herein at the request of the Commissioner of Prohibition for the tax penalties sought herein to be recovered, and in violation of section 3214 and section 3164 of the Revised Statutes of the United States, and also of paragraph C of section 4 of the act of Congress, March 3, 1927.

Wherefore, defendant prays to be hence dismissed with costs.

(Sgd.) M'CALEB & M'CALEB.
(Sgd.) REGINALD H. CARTER, JR.,
*Attorneys for defendant.*

In United States District Court

*Plea of former jeopardy*

Filed Dec. 2, 1927

Now comes Anthony LaFranca, made defendant in the above numbered and entitled cause, appearing solely for this plea and pleads in bar to the suit herein of the plaintiff on the following grounds:

(1) This is an action to recover tax penalties or penalties under the jurisprudence of the courts of the United States, and not taxes in the strict sense of the word.

11 (2) That said action by the United States should be dismissed for the reason that your defendant has already been penalized for the same and identical charges as set forth in plaintiffs petition, to wit: In the criminal information No. 10,124 of the criminal docket of this honorable court, and on April 28, 1926, your defendant pleaded guilty to the charges set forth in said information which are identical and provable by the same evidence as the penalties herein sought to be recovered, and there was a judgment of conviction entered on said date, to wit: April 28, 1926, fining respondent in the sum of $300.00, and imposing a six months suspended sentence upon him for his aforesaid violation of the national prohibition act.

(3) Defendant further avers that the United States in the petition herein filed has admitted in section 15, thereof, that you [your] defendant pleaded guilty in said criminal information as above set forth, and was penalized by the judgment of conviction therein.

Wherefore, defendant prays that this plea of former jeopardy be heard before other matters in this cause, and that it be decreed by this honorable court that the so-called taxes sought to be recovered by the United States are penalties, and defendant further prays that accordingly this plea of former jeopardy be sustained, inasmuch as said penalties sought to be recovered are provable by the same evidence and upon the same facts for which there is a judgment of conviction in favor of the United States, in the proceedings No. 10,124 of the criminal docket of this honorable court, and that he be accordingly dismissed with costs.

(Signed) M'Caleb & M'Caleb.
(Signed) Reginald H. Carter, Jr.,
*Attorneys for Defendant.*

12 *[Duly sworn to by Anthony LaFranca, jurat omitted in printing.]*

In United States District Court

*Hearing on special demurrer and plea of former jeopardy and submission*

May 16, 1928

This cause came on this day to be heard on the special demurrer & plea of former jeopardy, filed on behalf of defendant.

13 Present: E. Howard McCaleb, jr., of McCaleb & McCaleb and Reginald H. Carter, jr., Esqs., attorneys for defendant.

Present: T. M. Logan Bruns, assistant United States attorney, appearing on behalf of the United States.

Whereupon, after hearing arguments of counsel for the respective parties, the cause was submitted when the court took time to consider.

In United States District Court

*Order dismissing special demurrer and denying plea of former jeopardy*

May 25, 1928

This cause came on at a former day to be heard on the special demurrer and the plea of former jeopardy filed on behalf of the defendant, and was argued by counsel for the parties in interest and submitted when the court took time to consider.

14 Whereupon, and on due consideration whereof, and for the reason of the court assigned in writing and on file herein,

It is ordered by the court that the special demurrer understood to be abandoned be dismissed, and that the plea of former jeopardy be and the same is hereby denied.

In United States District Court

*Opinion*

Filed May 25, 1928

On special demurrer & plea of former jeopardy

BURNS, District Judge:

This is a civil suit at law, commenced by a petition alleging in substance that the defendant on specified date in October of 1924, and in April of 1925, was the owner, operator, and proprietor of the Delmonico Restaurant at 1300 St. Charles Street in New Orleans, where he had possessed and sold to Federal prohibition agents certain drinks of whiskey and other liquor, viz., a total of some sixteen drinks on three occasions in October, 1924, and a total of eight

15 drinks on two occasions in April, 1925; that, by his answer in a civil proceedings (in which it appears that the premises were declared a nuisance and closed by a writ of injunction under section 22 of the national prohibition act), the defendant admitted two of the said sales charged against him in October; and that in a criminal prosecution he pleaded guilty to the other of said sales (for which it appears he was sentenced to pay a fine of $300.00 and serve a term of imprisonment, execution of this latter being suspended under the national probation act of March 4, 1925).

The petition further recites that because of these said same acts, viz, by reason of the defendant selling distilled spirits in quantities

of less than five gallons at the same time, he became and was on these five dates a retail liquor dealer subject to the payment of a tax as such to the plaintiff Government under the provisions of U. S. Revised Statutes 3244, the tax provided by which statute to be doubled according to section 35, Title II, of the national prohibition act; that because he failed to make and file a return as a retail liquor dealer to the collector of internal revenue as required by section 53 of the act of October 1, 1890 (26 Stat. L. 624), he is liable for an additional tax penalty under U. S. Rev. Stat. 3176; that since the State of Louisiana by Act 39 of 1921 (Hood Act), prohibits the business of retail liquor dealer, he thereby incurred a special "tax" in the sum of $1,500.00, which is due and payable to the plaintiff United States under section 701 of the revenue act of 1924, in lieu of section 1001 of the revenue act of 1921, which in turn was in lieu of section 1001 of the revenue act of 1918, and this "tax" is doubled under section 35 of Title II of the national prohibition act
16 (October 28, 1919); that also because of his quality as a retail liquor dealer he is liable further in the penal sum of $500.00, as a specific penalty under said section 35.

The defendant demurs to the authority of the United States attorney to file such proceedings, but upon argument abandons that defense. He insists, however, on his plea former jeopardy, viz, that his prior conviction of the same charges and his sentence to a fine and imprisonment under section 29 of the national prohibition act bar this proceeding, which would otherwise put him twice in jeopardy for the same offense in violation of his constitutional immunity under the 5th amendment, and also the prohibition of dual prosecution in section 5 of the Willis Campbell Act (November 27, 1921).

Much argument orally and by briefs was indulged upon the hearing and submission of this plea with copious citations of authority on both sides. Reference to these will appear where it seems necessary as this opinion proceeds.

Section 35 of the national prohibition act was undoubtedly designed to cumulate penalties in addition to those variously provided in other sections of the act, in keeping with the general design of the whole act to enforce the eighteenth amendment by effectually suppressing the manufacture, traffic in, and use of alcoholic beverages. Congress emphasized this purpose by the supplemental act of November 23, 1921 (Willis-Campbell Act), after the Supreme Court's decisions in the case of United States vs. Yuganovich et al., 256 U. S. 450, holding that the penalties in section 35 superceded those in the Revised Statutes verbis Internal Revenue.

Section 5 of the Willis Campbell Act then operated to continue in force all non-conflicting revenue statutes (U. S. vs. Stafoff,
17 260 U. S. 477). It provides, inter alia, "but if any act is a violation of any such laws, and also of the national prohibition act, or this act, a conviction for such an act or offense under one shall be a bar to prosecution therefore under the other."

In Lipke vs. Lederer, 259 U. S. 557, the Supreme Court affirmatively held that the so-called taxes imposed by section 35 were in fact penalties imposed for violations of criminal laws which could not be collected by administrative officers in distraint proceedings, designed for the collection of taxes. Regal Drug Co. vs. Wardell, 260 U. S. 386, and U. S. vs. One Ford Coupe, 272 U. S. 321, P. 329, are to the same effect.

Suits for penalties and forfeitures are not novel in the Federal system. Such suits, while civil in form, have been uniformly recognized as of a quasi criminal character, they proceed on the law side of the court with trial by jury, whilst those for forfeitures are generally in rem, which proceed in much the same form as admiralty suit, except where seizures are made upon land, and these proceed at law by trial to a jury. Notwithstanding suits for penalties contemplate punishment for offenses, and are triable at law to a jury, they are not criminal prosecutions. The constitutional right to trial by jury in criminal cases, where the punishment is a fine or imprisonment, arises not from the fifth amendment, but from the sixth; whereas in civil cases, where the punishment is a penalty, the right to a jury trial arises from the seventh amendment. The difference does not consist merely in the civil form of the law suit by which they are collected, but in the substantial difference that the judgment is enforceable by ordinary execution and levy, as by writs of fiere facias, and not by commitment or imprisonment as in the
18 case of a fine. It is precisely this difference that would prevent the collection of such penalties by criminal information or indictment, and also prevent judicial relief from execution of judgment under the national probation act of March 4th, 1925. However, it follows that the defendants life or limb is not twice put in jeopardy for the same offense by the prosecution of this civil suit for a penalty. So far as the guaranties of the fifth amendment are concerned, such a suit, which may deprive him of property only, assures him due process of law.

The same considerations dispose of defendant's second contention with respect to the elective clause of section 5 of the Willis-Campbell Act. His conviction under various sections of the national prohibition act, for which he was fined and imprisoned under section 29, for the criminal offenses charged by indictment or information, will bar any other criminal prosecution for the same offense, but will not bar a civil prosecution for the cumulative penalty even though it be predicated on the same offense. In re Leszyasky, Fed. Cas. 8279; U. S. vs. Calflin, 97 U. S. 546; U. S. vs. Wiltberger, 5 Wheat. 75, 95; Origet vs. U. S. 125 U. S. 240, 247; U. S. vs. Three Copper Stills, 47 Fed. 499; U. S. vs. Zucker, 161 U. S. 475.

No other issues are raised by the plea, for the purpose of which the charges and allegations appearing on the face of plaintiff's petition are taken as true.

Accordingly, the plea of former jeopardy will be overruled and denied. The special demurrer, understood to be abandoned will be dismissed.

(Signed) LOUIS H. BURNS,
*United States District Judge.*

MAY 25TH, 1928.

19 In United States District Court

*General demurrer*

Filed June 6, 1929

Reserving the benefit of the plea of former jeopardy heretofore filed, and in nowise waiving the same, appearing solely for the purpose of this demurrer, the defendant, Anthony LaFranca comes thru his attorneys and demurs to the petition in the above-styled cause, for the reason:

1. That said petition does not state a cause of action against this defendant upon which this plaintiff can recover.

2. That said petition is based upon a statute which is unconstitutional, to wit: National prohibition act, particularly section 35 thereof, and section 5 of the act of November 3, 1921, in that said foregoing statutes are in violation of the Constitution of the United States, and particularly amendment 8 thereof.

3. That the petition herein set forth no cause of action because the particular cause of action sued on herein has been barred by the conviction of this defendant in case No. 10,124, of the criminal docket of this court for violation of the said national prohibition act, and therefore the action herein sued on can not be maintained by virtue of the provisions of the act of Congress, November 3, 1921, known as the Willis Campbell Act, particularly section 5 thereof.

20 Wherefore, defendant prays that this demurrer be maintained and plaintiff's suit be hence dismissed with costs.

(Sgd.) M'CALEB & M'CALEB,
*Attorneys for Defendant, R. H. Carter, jr.*

*Plea of res adjudicata*

Filed June 6, 1928

Now comes Anthony LaFranca, the defendant herein and reserving the benefit of the plea of former jeopardy heretofore filed and in nowise waiving the same, appearing solely for the purpose of this plea, says:

That on or about April 28, 1926, in the criminal information No. 10,124, of the criminal docket of this court, the defendant herein

plead guilty to the provisions set forth in said information and there was judgment entered on said date, to wit: April 28, 1926, fining defendant in the sum of three hundred ($300.00) dollars, and imposing a six months suspended sentence upon him.

That said judgment is a final judgment in favor of the United States and that the matters and things now set up and sought to be recovered on are identical with those for which your defendant has already been punished in the proceedings No. 10.124 as aforesaid.

Wherefore, defendant prays that this plea of res adjudicata be maintained and that he be dismissed with costs.

(Signed) M'CALEB & M'CALEB,
R. H. CARTER, JR.,
*Attorneys for Defendant.*

21 In United States District Court

*Hearing on plea of res adjudica and general demurrer and submission*

July 11, 1928

Hearing before honorable Ben C. Dawkins, District Judge

This cause came on this day to be heard upon the general demurrer and plea of res adjudica, filed on behalf of defendant.

Present: E. Howard M'Caleb, jr., attorney for defendant and plaintiff in rule.

Present: T. M. Logan Bruns, assistant U. S. atty., appearing on behalf of the United States.

and were argued by counsel for the respective parties and submitted when the court took time to consider.

22 In United States District Court

*Order denying general demurrer and plea of res adjudicata*

August 29, 1928

This cause came on at a former day to be heard on the general demurrer and plea of res adjudica and was argued by counsel and submitted;

Whereupon, and on consideration thereof;

It is ordered that the general demurrer and plea of res adjudica filed herein be and the same is hereby overruled, counsel for defendant taking a bill of exception to the ruling of the court.

In United States District Court

*Answer*

Filed Sept. 10, 1928

Now comes Anthony LaFranca, made defendant in the
23 above numbered and entitled cause, and reserving the benefit of the pleas and exceptions heretofore filed and overruled by the court, for answer to the action herein filed says:

1. The allegations of paragraph one are admitted.

2. For lack of information respondent denies the allegations of paragraph two.

3. For lack of information respondent denies the allegations of paragraph three.

4. For lack of information respondent denies the allegations of paragraph four.

5. For lack of information respondent denies the allegations of paragraph five.

6. For lack of information respondent denies the allegations of paragraph six.

7. Respondent denies the allegations of paragraph seven.

8. Paragraph eight contains only conclusions of law and not allegations of fact and respondent denies all the allegations of said article.

9. Respondent denies the allegations of paragraph nine.

10. For lack of information respondent denies the allegations of paragraph ten.

24 11. Respondent denies the allegations of paragraph eleven.

12. Respondent denies the allegations of paragraph twelve.

13. In answer to paragraph thirteen respondents says that the matters and allegations contained therein should be stricken from this record, and for lack of information denies the allegations thereof.

14. In answer to paragraph fourteen respondent says that the matters and things set forth therein are irrelevant and immaterial and should be stricken from this record, and if allowed to stay in the record, this respondent reiterates and reavers the pleas of former jeopardy and res adjudicata heretofore filed and overruled by the court. That the plaintiff herein is attempting to prove this case upon the evidence in a like criminal proceeding. Respondent further says that he admits that in the case No. 10,124 of the docket of this court he plead guilty to various charges of selling intoxicating liquor, but is not informed as to the dates thereof, or to whom said liquor was sold.

15. Respondent admits he received a letter addressed from O. D. Jackson, prohibition administrator, as set forth in paragraph fifteen and avers that said paragraph in plaintiffs petition should be stricken from the record, that the same is irrelevant and immaterial.

16. For lack of information respondent denies the allegations of paragraph sixteen.

25 17. Respondent admits amicable demand without avail, but denies the balance of said paragraph seventeen.

18. Respondent denies the allegations of paragraph eighteen.

Wherefore, respondent prays that the demand of the plaintiff be rejected, and he be hence dismissed with costs.

(Signed) M'CALEB & M'CALEB.
(Signed) REGINALD H. CARTER, JR.
*Attorneys for Anthony LaFranca, Respondent.*

[*Duly sworn to by Anthony LaFranca, jurat omitted in printing.*]

26 In United States District Court

*Supplemental answer of defendant and order*

Filed Jan. 18, 1929

Now comes Anthony LaFranca, defendant herein, with leave of court first had and obtained, for supplemental and amended answer to the petition herein filed says:

1. Defendant reiterates and reavers all of the allegations of the original answer filed herein, and for further answers says:

2. That by paragraphs ten, eleven, and twelve of the petition the plaintiff is seeking to recover penalities imposed under section 701 of the revenue act of 1924, as amended and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act in the sum of fifteen hundred ($1,500.00) dollars.

3. Now defendant says that the aforesaid amount sought to be recovered by the plaintiff should be disallowed and striken from the record herein for the reason that section 701 of the revenue act of 1924, and particularly paragraph nine thereof is unconstitutional, in that it violates the Constitution of the United States.

4. That said section 701 of the revenue act of 1924, particularly paragraph nine thereof is violative of the fifth amendment of the Constitution of the United States, in that it deprives defend-

27 ant of his property without due process of law in imposing a penalty for violation of a State law.

5. Defendant further avers that section 701 of the revenue act of 1924, particularly paragraph nine thereof, is further violative of the tenth amendment of the Constitution of the United States, in that it impinges upon the power reserved to the States, particularly the State of Louisiana.

Wherefore, defendant prays for leave of court to file this supplemental and amended answer and that he be hence dismissed with costs.

M'CALEB & M'CALEB,
*Attorneys for Defendant.*

Order

Let the foregoing supplemental and amended answer be filed. New Orleans, La., January 18, 1929.

(Signed) WAYNE G. BORAH,
*United States Judge.*

In United States District Court

*Stipulation of counsel waiving trial by jury*

Filed Mar. 19, 1929

It is stipulated and agreed that a trial by jury be waived in
28 the above entitled cause, and that the issues of fact and of law in said action be heard, tried, and determined by the Judge of the above named Court as provided for by Section 649 of United States Revised Statutes.

(Signed) T. M. LOGAN BRUNS,
*Of Counsel for Plaintiff.*

(Signed) E. HOWARD M'CALEB, JR.,
*Of Counsel for Defendant.*

In United States District Court

*Stipulation of facts*

Filed Mar. 19, 1929

It is stipulated and agreed that if the witnesses were sworn and testified in this case and the available documentary proof introduced that they would establish the following facts and the parties hereto agree to same, and evidence of which, except this agreement, need not be made further upon the trial, the facts in this case being stipulated to be:

1. That on the dates hereinafter mentioned the defendant was the owner, operator, and proprietor of the restaurant commonly known as the "Delmonico Restaurant," located at the municipal number 1300 St. Charles Avenue, in the city of New Orleans, State of Louisiana.

2. That at or about 9.00 p. m., October 10, 1924, in said restaurant, the defendant did possess and sell to one William Trahan, a
29 white man, at the rate of fifty cents (.50) per drink nine (9) drinks of whiskey for the sum of four dollars and fifty cents ($4.50).

3. That at or about 10.20 p. m., October 23, 1924, in said restaurant, defendant did possess and sell to the said William Trahan, at the rate of fifty cents ($.50) per drinks, five (5) drinks of whiskey for the sum of two dollars and fifty cents ($2.50); and on the same date,

time, and place, defendant did possess and sell to one Eugene Hogan, a white man, at the rate of fifty cents ($.50) per drink, two drinks of whiskey for the sum of one dollars ($1.00).

4. That at or about 5.00 p. m., October 24, 1924, in said restaurant, the defendant did possess and sell to the said E. M. Hogan, at the rate of fifty cents ($.50) per drinks, two drinks of apricot brandy for the sum of one dollars ($1.00); and, on the same date, time, and place defendant did possess and sell to the said William Trahan for one dollar and fifty cents ($1.50), one-half pint of apricot brandy.

5. That at or about 8.00 p. m., April 23, 1925, in said restaurant, the defendant did possess and sell to the said William Trahan, at the rate of seventy-five cents ($.75) per drinks, four (4) drinks of benedictine for the sum of three dollars ($3.00).

6. That at or about 7.00 p. m., April 25, 1925, in said restaurant, the defendant did possess and sell to the said William Trahan, at the rate of fifty cents ($.50) per drinks, three (3) drinks of whiskey for the sum of one dollars and fifty cents ($1.50), and one bottle containing five ounces of whiskey for one dollar and fifty cents ($1.50).

30 7. That all the drinks of liquors, to wit: Whiskey, benedictine, and apricot brandy, possessed and sold for beverage purposes by defendant, as aforesaid, were distilled spirits, intoxicating liquors fit for beverage purposes, and containing more than one-half of one per cent of alcohol by volume.

8. That defendant never made and filed a return as provided by section 53 of act of October 1, 1890, 26 Stat. L. 624, showing the commencing of the trade or business of a retail liquor dealer (or the later carrying on of such business) on October 10, 1924, or on any subsequent date.

9. That the attached copy of Act No. 39 of the Legislature of the State of Louisiana, approved November 16, 1921, is a true and correct copy of said act and that said act was in full force and effect in the State of Louisiana during the years 1924 and 1925.

10. That in the proceeding entitled the United States vs. Anthony LaFranca, No. 10124, of the docket of this court, the said Anthony LaFranca on April 28, 1926, did plead guilty to the charge of possessing intoxicating liquor on August 23, 1923, maintaining a common nuisance on April 25, 1925, and to selling intoxicating liquor on the dates and in the form and manner set forth in articles two, three, four, and six of this stipulation, to wit: on October 10, 1924, nine (9) drinks of whiskey, on October 23, 1924, whiskey, on October 24, 1924, brandy, on April 23, 1925, benedictine, on April 25, 1925, whiskey, in violation of sections 3, 21, and 29 of the national prohibition act, upon which three charges he was sentenced to pay a fine of $300 and to serve a six-month term of imprisonment,

31 execution of this latter being suspended under act of March 4, 1925.

It is further agreed that demand was made [illegible] and received by the defendant for the taxes and tax penalties sought to be recovered in this suit, in the manner and form set forth in articles XV, XVI, and XVII of plaintiff's petition, but that said demands were without avail, and the said taxes and tax penalties have never been paid.

It is understood and agreed that the defendant fully reserves the right to urge the legal defenses heretofore raised by his pleadings and that the use of the words "taxes" and "tax penalties" in the previous paragraph of this stipulation in no way binds either party from arguing the true nature of any item sought to be recovered in this suit.

(Signed) T. M. LOGAN BRUNS,
*Of Counsel for the United States.*
(Signed) E. HOWARD M'CALEB, JR.

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*Exhibit attached to stipulation of facts, being Act No. 39 of the Legislature of the State of Louisiana*

Filed Mar. 19, 1929

Act No. 39

Senate Bill No. 11. By Mr. Hood

An Act to prohibit the manufacture, sale, transportation, delivery, possession, advertisement, exportation, and importation, of
32 intoxicating liquors for beverage purposes, except where authorized by permit from proper Federal authorities, and to provide penalties for the violation of this Act, and to provide for the detection, seizure, and disposition of illegally held liquors and apparatus.

Manufacture, sale, etc., of intoxicating liquors prohibited:

Section 1. Be it enacted by the Legislature of Louisiana, that no person shall manufacture, sell, or in any manner dispose of, transport, deliver, or possess intoxicating liquors within this State, export the same from or import the same into this State for beverage purposes.

Permit:

No person shall manufacture, sell, or in any manner dispose of, transport, deliver, or possess intoxicating liquors within this State, export the same from, or import the same into this State for non-beverage purposes, unless he shall be the holder of a legal permit therefor from proper Federal authorities.

Pohibiting advertisement:

Section 2. That no person shall advertise, either directly or indirectly or by any means, the manufacture, sale, or the keeping for sale

of intoxicating liquors in this State for beverage purposes, and no person shall solicit or receive orders for the sale of such liquors for such purposes.

Penalty:

Section 3. That any person who shall violate the provisions of this act by manufacturing, or having in possession for sale, or, by
33 selling intoxicating liquors shall be guilty of a misdemeanor, and upon conviction for the first offense shall be fined not more than five hundred dollars ($500.00), and be imprisoned not less than ten days, nor more than sixty days, and for the second or subsequent offense, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) and be imprisoned not less than thirty days nor more than twelve months; and any person who shall otherwise violate the provisions of this act shall, upon conviction, be fined as hereinabove provided or may be imprisoned not exceeding the maximum limits hereinabove provided, or may be both fined and imprisoned, at the discretion of the court.

For family use excepted:

Section 4. That nothing in this act shall be construed to forbid the possession of intoxicating liquors in one's private dwelling or abode while the same is occupied by him as such a dwelling, provided, such intoxicating liquors were legally acquired and are only for personal consumption by the owner thereof and his family residing in such dwelling and his bona fide guest when entertained by him therein.

Beer and wine:

Nothing in this act shall be construed to prevent a citizen who is a householder from brewing beer and fermenting wine for the use of himself and his family in his home and his bona fide guest entertained in such home.

Search & seizure:

Section 5. That no suspected place other than such as is open
34 to the public shall be invaded and searched except by an officer designated in a search warrant issued by a competent court having the power of a committing magistrate upon the filing with said court of an affidavit reciting the facts that affiant has reasons to believe and believes that such designated place is being utilized as a site for the violation of the provisions of this act, together with such additional evidence as the court may require to make out a prima facie case, and no house, room, or apartment used as, or which is apparently is, a bona fide residence, shall be subject to invasion and search, except by an officer designated in a search warrant issued by a competent court having the powers of a committing magistrate upon the filing in said court of an affidavit by two reliable persons reciting that they have reasons to believe and do believe that said place of residence is being used as a cloak or cover for a violation of the provisions of this act, and reciting the specific violation being committed therein, together with such additional corroborating evidence as the

court may, in its discretion, require to establish the probable existence of the alleged violation of this act. The warrant shall be directed to a duly authorized peace officer and the premises described in the warrant shall be searched and all intoxicating liquors, stills, equipment, apparatus, containers, bottles, etc., or any property used or designed or intended to be used in the manufacture or sale of intoxicating liquors on said premises shall by such officer be seized and the keeper of such place or the person to whom such liquor or property belongs shall be apprehended and brought before the court issuing the warrant to abide the further orders of the court. The officers to whom the search warrant is directed shall make proper returns on the
35 warrant of the action taken thereunder, describing the liquors or property seized, if any, and liquors or property so seized shall be held by such officers without the right of being released upon writ or claim, except liquors seized in a bona fide dwelling house, which liquors shall be released to its owner upon his giving bond, with good and valid surety, for the value of such liquors, conditioned upon the return of such liquors to such officer upon the order of the court. The court, after the trial of the accused, shall order all liquors and property illegally held by the accused at the time of seizure to be immediately and publicly destroyed, by the sheriff or peace officer designated by the court.

The court shall preserve in its records subject to inspection at any time by the public, the affidavits hereinabove referred to. If it should appear that the person or persons making said affidavit had done so maliciously, or without probably cause, and any house, room or apartment used as a bona fide residence is searched by reason of the issuance of a search warrant as the result of the said affidavit, the person or persons making said affidavit shall be deemed guilty of a misdemeanor, and no conviction shall be fined not more than five hundred dollars, or imprisoned for not less than ten days nor more than sixty days or both fine and imprisonment at the discretion of the court.

Duty of sheriff and other authorities:

Section 6. That when any sheriff or any other duly constituted peace officer of this State shall discover any person in the act of transporting, in violation of the law, intoxicating liquors in any vehicle, or otherwise, it shall be the duty of such officer to seize the intoxicating liquors found therein and being transported contrary to law, and arrest any person in charge thereof. The
36 person so arrested shall be proceeded against under the provisions of this act, and after the trial of the charges against him the liquors so seized, if held by court to have been illegally transported, shall be ordered by the court to be immediately and publicly destroyed by the sheriff or other peace officers designated by the court, provided the provisions of this section shall not apply to a person who is in the possession of liquors herein recognized

and permitted and who transports same for personal use and consumption only.

Fines to be paid over to "sheriff's salary fund":

Section 7. That the fines collected from convictions for violations of this act, shall be paid into the parish treasury, and the whole or any part thereof may be appropriated to the "sheriff's salary fund," to be disbursed according to law; provided that upon the recommendation of the district attorney and the order of the judge, the police jury shall appropriate such a part thereof, as may be directed by such order to the "sheriff's salary fund."

Liquor defined:

Section 8. That the word "liquor" or the phrase "intoxicating liquor" wherever used in this act shall be construed to include alcohol, whiskey, brandy, rum, gin, beer, ale, porter, wine, and any spirituous vinous malt or fermented liquor or liquids by whatever name called, as defined by Federal legislation, and all alcoholic liquids, either medicated, proprietary, or patented, which are fit for use as a beverage or for intoxicating beverage purposes, all as defined by Federal legislation.

37 Person defined:

The word "person" shall mean natural persons, associations, copartnerships, corporations, and their clerks, officers, agents, and servants.

The word "vehicle" shall include all such means of transportation as a buggy, wagon, automobile, truck, water, or aircraft, etc.

Investigations:

Section 9. That it shall be the duty of the district judges of the several district courts of this State to charge each grand jury to make special investigation concerning violations of this act and to report to the court of such actions as is taken.

Existing act not effected:

Section 10. This act shall in no way repeal any part of Act No. 8 of the special session of the General Assembly of 1915, approved July 9th, 1915, commonly called "the blind tiger act" and Act No. 14 of the regular session of the General Assembly of 1916, commonly called the "near beer act." All other laws or parts of laws in conflict with the provisions of this act be and they are hereby repealed.

Approved: By the lieutenant governor and acting governor. November 16, 1921.

A true copy.

JAMES J. BAILEY,
*Secretary of State.*

38 In United States District Court

*Joint motion for findings of fact and order granting same*

Filed Mar. 19, 1929

Now comes plaintiff and defendant through their respective counsel and jointly move that the court find the facts to be as stipulated herein.

(Signed) T. M. LOGAN BRUNS,
*Of Counsel for the United States.*
(Signed) E. HOWARD M'CALEB, JR.,
*Of Counsel for Defendant.*

Granted.

(Sgd.) BEN C. DAWINS, *Judge.*

In United States District Court

*Motion for plaintiff for conclusions of law and judgment*

Filed Mar. 19, 1929

Motion of plaintiff for conclusions of law and judgment.

Now comes the plaintiff, the United States of America, by its attorney, T. M. Logan Bruns, assistant United States attorney for the Eastern District of Louisiana, and after the conclusion of the
39 evidence and before judgment rendered by the court, respectfully moves the court to find from the evidence in this case the following conclusions of law and judgment in favor of the plaintiff, a stipulation of the facts having been previously filed herein and now being made a part of this motion.

1. That by reason of defendant selling in his said restaurant as appears from the stipulation of facts filed herein, distilled spirits in less quantity than five wine gallons at the same time, to wit: nine (9) drinks of whiskey of October 10, 1924; five (5) drinks of whiskey on October 23, 1924; two (2) drinks of apricot brandy on October 24, 1924; four (4) drinks of benedictine on April 23, 1925, and three (3) drinks of whiskey and five (5) ounces of whiskey on April 25, 1925, the defendant became and was, on the aforesaid dates, a retail liquor dealer, subject to the payment of a tax as such, to plaintiff, as provided by section 3244 of the United States Revised Statutes as amended. (See U. S. C. A. Title 26, sections 202 and 205) and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act, in the sum of thirty-seven dollars and fifty cents ($37.50) being the special tax of a retail liquor dealer for nine (9) months, ending June 30, 1925.

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*

2. That the aforsaid retail liquor dealer's tax was due and payable to plaintiff by this defendant on October 10, 1924, and defendant

was required, as provided by section 53 of act of October 1, 1890, 26 Stat. L. 624, to make and file a return on that date, but
40 defendant failed so to do has so failed up to this date and thereby has incurred an additional tax penalty, which is due and payable to plaintiff as provided by section 3176 of the United States Revised Statutes, as amended, in the sum of four dollars and sixty-eight cents ($4.68).

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*

3. That by reason of the sales of intoxicating liquor as set forth in the stipulation of facts filed herein, this defendant did carry on, on the dates set forth in said stipulation the business of a retail liquor dealer, as defined in section 3244 of the United States Revised Statutes as amended (U. S. C. A. Title 26, sec. 205), and contrary to the law of the State of Louisiana, and incurred thereby a special tax in the sum of fifteen hundred ($1,500.00) dollars which is due and payable to plaintiff as provided by section 701 of the revenue act of 1924, in lieu of section 1001 of the revenue act of 1921, which was in turn in lieu of section 1001 of the revenue act of 1918, and doubled under section 35 of Title II of the act approved October 28, 1919, known as the national prohibition act.

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*

4. That by reason of the sales of intoxicating liquor as set forth in the stipulation of facts filed, defendant became and was, a retail liquor dealer and as set forth in section 35 of Title II of the
41 act, approved October 28, 1919, known as the national prohibition act, became liable to plaintiff in the penal sum of five hundred ($500.00) dollars, as provided by the said section 35.

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*

5. That plaintiff is entitled to judgment in his favor as prayed for, and that judgment be entered accordingly with costs.

Granted.

(Sgd.) BEN C. DAWKINS, *Judge.*
(Sgd.) T. M. LOGAN BRUNS,
*Of Counsel for the United States.*

In United States District Court

*Case called, argued, & submitted*

This cause came on to be heard on the pleadings and agreed stipulations of facts, counsel for the respective parties having also filed a stipulation waiving trial by jury.

42 Present: T. M. Logan Bruns, assistant United States attorney, for petitioner.

Present: E. Howard M'Caleb, jr., appearing for the defendant.

and was argued by counsel for the respective parties, in interest, and submitted, when the court took time to consider.

7

In United States District Court

*Opinion*

Filed May 28, 1929

DAWKINS, J.:

In the above numbered and entitled cause, after careful examination of the matter upon the agreed statement of facts, I am of the opinion that the plaintiff is entitled to a judgment as prayed for. Proper decree may be presented and the right of the defendant to prepare and present his exceptions will be reserved until the decree has been signed.

Done and signed at Monroe, Louisiana, in chambers on this the 27th day of May, A. D. 1929.

(Sgd.) BEN C. DAWKINS,
*U. S. D. J.*

43 In United States District Court

*Motion for a new trial*

Filed Jun. 7, 1929

Comes now the defendant, Anthony LaFranca, through undersigned counsel, and moves the court for a new trial, and for causes thereof, says:

1. The judgment of the court is contrary to the law and to the evidence.

2. The court erred in overruling the defendant's plea of former jeopardy, and the court erred in not sustaining the same.

3. The court erred in overruling the defendant's plea of res adjudicata, and the court erred in not sustaining the same.

4. The court erred in not holding section 701, paragraph nine, of the revenue act of 1924 unconsitutional on the grounds and for the reasons as set forth in defendant's supplemental answer, and the court erred in ruling that said section 701, paragraph nine, of the revenue act of 1924 was constitutional.

Wherefore, the defendant prays that upon due consideration that the court grant a new trial herein on the grounds and for the errors committed in the trial of this cause, all as above set forth.

(Signed) MCCALEB & MCCALEB,
*Attorneys for Defendant.*

44 In United States District Court

*Hearing on motion for new trial and order denying same*

June 27, 1929

This cause came on this day to be heard upon the motion filed on behalf of the defendant for a new trial herein:

Present: E. Howard McCaleb, jr., attorney for defendant.

Present: T. M. Logan Bruns, Esq., asst. U. S. attorney appearing on behalf of the plaintiff, defendant in rule.

Whereupon, after hearing said rule and arguments of counsel for the respective parties,

It is ordered that said motion be and the same is overruled, to which ruling counsel for defendant reserved a bill of exception.

45 In United States District Court

*Judgment*

May 27, 1929

This cause having come on regularly for trial before the court without a jury, the same having been waived by stipulation filed in writing by the respective parties and having been submitted for decision on an agreed statement of facts and the court having heard arguments of counsel and having duly considered the same;

It is ordered, adjudged, and decreed for the written reasons on file herein, that there be judgment in favor of the plaintiff, United States of America, and against the defendant, Anthony LaFranca, in the full sum of two thousand and forty-two and 18/100 ($2,042.18) dollars, and all costs of this proceeding.

Judgment rendered May 27, 1929.

Judgment signed June 27, 1929.

(Signed) BEN C. DAWKINS, *Judge.*

46 In United States District Court

*Petition for appeal and order allowing same*

Filed June 27, 1929

The petition of Anthony LaFranca, defendant herein, respectfully shows:

That petitioner is aggrieved by the judgment and decree herein rendered on June 27th, 1929, in favor of the United States and against said defendant in the sum of two thousand and forty-two and 18/100 ($2,042.18) dollars, and that petitioner for the reasons specified in the assignment of errors filed herein desires to appeal from

said judgment, and desires that said appeal, returnable to the United States Circuit Court of Appeals for the Fifth Circuit, shall operate as a supersedeas and may suspend, during the pendency of said appeal, the effect of said judgment.

Wherefore, petitioner prays that the said appeal may be allowed, and that upon his giving bond in an amount to be fixed by this court the said appeal may operate as a supersedeas and may suspend, during the pendency of said appeal, the effect of said judgment; that said appeal be made returnable to the United States Circuit Court of Appeals for the Fifth Circuit according to law, and that a transcript of the record, proceedings, papers, and exhibits upon which said judgment was rendered duly authenticated be sent to said Circuit Court of Appeals.

(Signed) M'CALEB & M'CALEB,
(Signed) E. HOWARD M'CALEB, JR.,
*Attorneys for Petitioner.*

47 *Order allowing appeal with supersedeas*

Considering the foregoing petition this day presented, it is ordered that an appeal be allowed to Anthony LaFranca, petitioner herein, and defendant in this suit, from the judgment of June 27th, 1929, rendered against said defendant in the above entitled and numbered cause and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Fifth Circuit, and that upon the execution of a bond in the sum of $2,500.00 to be approved by the clerk of court appeal shall operate as a supersedeas of said judgment and shall suspend until the final judgment or appeal herein, the effect of said judgment herein, and that a transcript of the record be filed in the United States Circuit Court of Appeals for the Fifth Circuit according to law as prayed for.

New Orleans, La., June 27, 1929.

(Signed) BEN C. DAWKINS,
*United States District Judge.*

In United States District Court

*Assignment of errors*

Filed June 27, 1929

The defendant in this cause in connection with his petition for an appeal makes the following assignments of error which he avers occurred upon the trial of this cause, to wit:

48 (1) The court erred in overruling the defendant's plea of former jeopardy, and the court erred in not sustaining the same.

(2) The court erred in overruling the defendant's plea of res adjudicata, and the court erred in not sustaining the same.

(3) The court erred in not holding section 701, paragraph 9, of the revenue act of 1924 unconstitutional, and as violative of the tenth amendment of the Constitution of the United States, and the court erred in ruling that said section 701, paragraph 9, of the revenue act of 1924 was constitutional.

(4) The court erred in overruling the defendant's motion for a new trial.

Wherefore, the defendant prays that the judgment of the District Court may be reversed.

(Signed) M'CALEB & M'CALEB,
(Signed) E. HOWARD M'CALEB, Jr.,
*Attorneys for Defendant.*

In United States District Court

*Certificate of judge to file exceptions*

Filed June 27, 1929

Thereafter on the 27th day of June, 1929, and within the time allowed by said United States District Court the defendant duly tendered his bill of exception herein, which having been seen
49 and examined by the court and counsel, is by the court allowed and approved, and the said bill of exception is signed and sealed by the Honorable Ben C. Dawkins, judge of said court before whom said proceedings were had, and the same is ordered by said court to be filed and made part of the record herein, which is now accordingly done.

Given under the hand and seal of the judge of said court before whom proceedings were had on this 27th day of June, 1929.

(Signed) BEN C. DAWKINS,
*Judge United States District Court for the Eastern District of Louisiana.*

The above and foregoing bill of exception is hereby approved.

(Sgd.) T. M. LOGAN BRUNS,
*Asst. United States Attorney.*
(Sgd.) M'CALEB & M'CALEB,
(Sgd.) E. HOWARD M'CALEB, Jr.,
*Attorneys for Defendants.*

Let the bills be filed and the filing shown of record as of this 27th day of June, 1929.

(Signed) BEN C. DAWKINS, *Judge.*

In United States District Court

*Bill of exception and order approving same*

Filed June 27, 1929

Be it remembered, that on the trial of the petition in this cause, and in this court, at the February term, 1929, the Honorable Ben C. Dawkins, judge presiding, the following proceedings were had, to wit:

50 The jury was waived by written stipulation between counsel as provided for by section 649, United States Revised Statutes, and the case submitted to the court on a stipulation or agreement of facts, which is attached hereto and made part of this bill of exceptions.

Thereafter the matter being submitted to the court on a stipulation of facts, as aforesaid, the court having found the facts to be as stipulated granted plaintiff's motion for conclusions of law and judgment and gave judgment in favor of the plaintiff in the sum prayed for, to which action of the court counsel for the defendant then and there excepted, and still excepts, and he thereupon filed a motion for a new trial which being overruled by the court was duly excepted to.

And now in furtherance of justice and that right may be done the defendant Anthony LaFranca tenders and presents the foregoing as his bill of exception in this cause to the action of the court, and prays that the same may be allowed, signed and sealed by the court, and made part of the record and the same is accordingly done this 27th day of June, 1929.

(Signed) BEN C. DAWKINS,
*Trial Judge.*

[Supersedes bond on appeal for $2,500.00 approved and filed July 3, 1929; omitted in printing.]

51–52 In United States District Court

*Pracipe for transcript of record*

Filed July 16, 1929

Hon. H. J. CARTER,
*Clerk, U. S. District Court, New Orleans, Louisiana.*

DEAR SIR: In making up the transcript of record on the appeal taken in the above entitled and numbered cause, please include the following:

1. Petition and affidavit.
2. Special demurrer of defendant.

53 3. Plea of former jeopardy of defendant.

4. Hearing on special demurrer and plea of former jeopardy and submission.

5. Order dismissing special demurrer and denying plea of former jeopardy.
6. Opinion of the court.
7. General demurrer of defendant.
8. Plea of res adjudicata.
9. Hearing on general demurrer and res adjudicata and submission.
10. Order overruling general demurrer and plea of res adjudicata.
11. Answer of defendant.
12. Supplemental answer of defendant and order.
13. Stipulation of counsel waiving trial by jury.
14. Stipulation of facts and exhibit attached.
15. Joint motion for findings of fact.
16. Motion of plaintiff for conclusions of law and judgment.
17. Case called, argued, and submitted.

54 18. Opinion of the court.

19. Motion for new trial.
20. Hearing on motion for new trial and order overruling same.
21. Judgment.
22. Petition for appeal and order allowing same.
23. Assignment of errors.
23½. Certificate of judge to file exceptions.
24. Bill of exceptions.
25. Appeal bond.
26. This praecipe.

Respectfully,

(Sgd.) E. HOWARD M'CALEB, JR.,
*Attorney for Appellant.*

Approved:

T. M. LOGAN BRUNS,
*Assistant U. S. Attorney.*

55 [Clerk's certificate to foregoing transcript omitted in printing.]

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Original citation omitted from the printed record, the original thereof being on file in the office of the clerk of the U. S. Circuit Court of Appeals.

* * * * * * *

56 [Minute entry of argument and submission, Dec. 9, 1929, omitted in printing.]

57 Filed January 7, 1930

In United States Circuit Court of Appeals for the Fifth Circuit

No. 5654

ANTHONY LA FRANCA, APPELLANT

VERSUS

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Louisiana

E. Howard McCaleb, jr., for appellant.

T. M. Logan Bruns, asst. U. S. atty. (Edmond E. Talbot, U. S. atty., and T. M. Logan Bruns, asst. U. S. atty, on the brief), for appellee.

Before WALKER, BRYAN, and FOSTER, Circuit Judges

*Opinion*

WALKER, Circuit Judge:

This was an action against the appellant to recover the tax imposed on retail liquor dealers by § 3244 of the Revised Statutes, the amount of which is increased by § 35 of the national prohibition act, the penalty for failure to make return required by statute, and the additional penalty of $500.00 on retail liquor dealers prescribed by § 35 of the national prohibition act. The claims asserted were based upon described sales of whiskey by appellant on October 10, 1924, October 23, 1924, and April 25, 1925, upon described sales of apricot brandy by appellant on October 24, 1924, and upon a described sale of benedictine by the appellant on April 23, 1925. The granting of the relief sought was resisted on the ground that prior to the institution of the suit appellant had been convicted and sentenced under an information charging him with possessing intoxicating liquor, with maintaining a common nuisance, and with selling intoxicating liquor, which charges were based on the same sales which were alleged in the petition in this case. The court ruled against the defense so set up, and, upon the parties stipulating in writing that a jury be waived and that the facts were substantially as alleged in the petition and in the pleading setting up the above-mentioned de-
58 fense, the court rendered judgment in accordance with the prayer of the petition.

The so-called taxes and other charges retained in force by section 35 of the national prohibition act and section 5 of the Willis-Campbell Act (42 Stat. 223) are penalties or fines imposed as punishment for criminal misconduct. Lipke v. Lederer, 259 U. S. 557; Regal Drug Co. v. Wardell, 260 U. S. 386. Section 5 of the Willis-Campbell Act contains the following provision: "That all

laws as to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the national prohibition act was enacted shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the national prohibition act or of this act; but if any act is a violation of any of such laws and also of the national prohibition act or of this act, a conviction for such act or offense under one shall be a bar to a prosecution therefor under the other."

The conviction of appellant was for violations of the national prohibition act, §§ 21, 25, and 29. The so-called tax sought to be enforced by this suit was imposed by section 3244 of the Revised Statutes, but the amount of it was increased by the provision contained in section 35 of the national prohibition act. But for laws which were in existence prior to the enactment of the national prohibition act appellant would not have been liable for the amounts sought to be recovered in this suit, as only preexisting laws provide for a tax on retail liquor dealers and a penalty for a failure to make return. The conviction of the appellant having been for acts which were violations of the national prohibition act, and the purpose of this suit being to subject appellant to liabilities for the same acts, created by preexisting laws referred to in the above-set-out provision, that conviction was a bar to this suit if this suit, within the meaning of that provision, is a prosecution, for those acts. The use of the word "prosecution" in describing what is barred by a conviction for a violation of one of the laws referred to in the above-set-out provision is consistent with the absence of intention to refer only to proceedings commenced by an indictment or information, or on the criminal side of a court. In ordinary usage that word has different meanings when used in different relations. It properly may be used to describe or include a proceeding on the civil side of a court. Salinger v. Loisel, 265 U. S. 224, 236; 32 Cyc. 727.

59 The provision in question clearly discloses a purpose to restrict the punitive consequences of an act which is a violation of both a recently enacted statute mentioned and of a previously enacted statute which was continued in force. It affords to one who has been convicted protection against further proceedings to subject him to punishment for the same act or offense. When a statutory provision deals with such a subject as double punishment for the same act or offense, which has long been recognized to be at variance with right and justice, an intention to make the benefit of the protection provided for dependent upon the form of proceeding resorted to for the enforcement of additional punishment is not to be attributed to the lawmakers unless such intention is disclosed. United States v. Chouteau, 102 U. S. 603, 611. A penalty imposed for criminal misconduct is none the less punitive by reason of the fact that it may be enforced by a proceeding civil in form. This suit as clearly seeks to subject appellant to additional punishment for the acts for which he was convicted as would have been

sought by an indictment or information based on the same acts In our opinion nothing in the language of the provision in questio warrants such a sacrifice of substance to mere form as would be involved by holding that this suit is not barred, because, though i seeks to subject appellant to punishment for the same acts for which he was convicted, it was in form a civil proceeding.

We conclude that the above-set-out provision has the effect o making the above-mentioned conviction of the appellant a bar t this suit. The court erred in ruling otherwise. The judgment i reversed.

60 In United States Circuit Court of Appeals

No. 5654

ANTHONY LAFRANCA

VERSUS

UNITED STATES OF AMERICA

*Judgment*

January 7, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

61 [Clerk's certificate to foregoing transcript omitted in printing.]

62 Supreme Court of the United States

*Order allowing certiorari*

Filed May 5, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34931. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 800. The United States of America, petitioner, vs. Anthony LaFranca. Petition for writ of certiorari and exhibit thereto. Filed April 7, 1930. File No. 34931.

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